

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**JACK O' CONNELL, in his official capacity as  
Superintendent of Public Instruction in California; the  
STATE OF CALIFORNIA; the CALIFORNIA  
DEPARTMENT OF EDUCATION; and the  
CALIFORNIA STATE BOARD OF EDUCATION,**

Petitioners,

v.

**SUPERIOR COURT OF ALAMEDA COUNTY,**

Respondent,

**LILIANA VALENZUELA, et al.,**

Real Parties in Interest.

S \_\_\_\_\_

From the Superior Court for Alameda County, Case No. JCCP 4468  
The Honorable Robert B. Freedman, Judge  
Department 20 (510- 272-6165)

**PETITION FOR WRIT OF CERTIORARI AND/OR MANDATE OR OTHER  
APPROPRIATE RELIEF; POINTS AND AUTHORITIES**

**REQUEST FOR IMMEDIATE STAY OF INJUNCTION AGAINST  
REQUIREMENT THAT STUDENTS PASS THE EXIT EXAM**

BILL LOCKYER  
Attorney General of the State of California

JAMES M. HUMES  
Chief Assistant Attorney General

MANUEL M. MEDEIROS  
Solicitor General

THOMAS R. YANGER  
Senior Assistant Attorney General

DOUGLAS M. PRESS  
Supervising Deputy Attorney General

KARA READ-SPANGLER  
Deputy Attorney General

HADARA R. STANTON  
Deputy Attorney General

KARIN S. SCHWARTZ  
Deputy Attorney General  
State Bar No. 209455

455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-7004

Telephone: (415) 703-1382

Fax: (415) 703-5480

Email: [karin.schwartz@doj.ca.gov](mailto:karin.schwartz@doj.ca.gov)

Attorneys for Petitioners

## TABLE OF CONTENTS

	Page
INTRODUCTION	1
PETITION	3
A. Beneficial Interest of Petitioner; Capacities of Respondent and Real Parties In Interest.	3
B. The CAHSEE Graduation Requirement.	6
C. Chronology of Pertinent Events.	8
D. Basis for Relief.	10
E. Justification for Seeking Relief in this Court in the First Instance and Inadequacy of Appeal as a Remedy.	10
F. Irreparable Harm.	11
G. Need For Immediate Stay.	11
H. Authenticity of Exhibits.	12
PRAYER	13
VERIFICATION	15
MEMORANDUM OF POINTS AND AUTHORITIES	16
<b>I. RELIEF FROM THIS COURT IN THE FIRST INSTANCE IS ESSENTIAL TO RESOLVE AN ISSUE OF URGENT STATEWIDE IMPORTANCE</b>	16
A. The Issue Is of Statewide Importance and Threatens to Become Effectively Moot in the Absence of Immediate Relief by this Court.	16

## TABLE OF CONTENTS (continued)

	Page
B. This Court's Immediate Consideration Is Required to Clarify That Courts May Not Rely on <i>Butt</i> and <i>Serrano</i> as Authorization to Excuse Students Statewide from Educational Standards as a Purported Remedy for Alleged Inequality of Educational Opportunities.	17
C. Petitioners Have No Plain, Speedy, or Adequate Remedy in the Ordinary Course of Law to Redress an Irreparable Injury to Legislatively Mandated Educational Policy.	17
<b>II. RESPONDENT EXCEEDED ITS JURISDICTION BY EXCUSING ALL HIGH SCHOOL SENIORS STATE-WIDE FROM THE EXIT EXAM REQUIREMENT FOR GRADUATION</b>	18
A. Nothing in this Court's <i>Butt</i> and <i>Serrano</i> Decisions Supports Respondent's Usurpation of the Legislature's Power to Set Educational Policy.	18
1. The Orders Affirmed by this Court in <i>Serrano</i> and <i>Butt</i> Directed the State to Achieve a Result But Left the Manner to the State's Discretion.	18
2. The Remedy Ordered by Respondent in this Case – Issuance of Diplomas – Is Incompatible with <i>Serrano</i> and <i>Butt</i> .	20
3. The Remedy Ordered by Respondent in this Case – Issuance of Diplomas – Is Incompatible with Separation of Powers.	21
4. Relieving an Academic Requirement to Address Educational Inequalities Is Bad Policy.	24

## TABLE OF CONTENTS (continued)

	Page
B. Respondent Exceeded its Jurisdiction by Issuing a Statewide Injunction Against the CAHSEE When Plaintiffs' Claims Failed as a Matter of Law.	25
1. A Naked Allegation of Unequal Educational Opportunities Is Insufficient to State an Equal Protection Claim.	25
2. Plaintiffs Failed to Show That They Suffered Any Injury Common to a Purported Class of Students Who Are Denied Equal Protection of the Law.	27
C. Respondent Exceeded Its Jurisdiction by Excusing from the Statutory Graduation Requirements Persons Who Cannot Claim to Have Been Unconstitutionally Burdened as a Result of Any State Action or Inaction.	29
D. Respondent's Order Violates the Rule Against Claim-Splitting.	31
E. Respondent's Order Cannot Be Justified as a Remedy for Alleged Unequal Allocation of Support Funds.	32
1. The Legislature by Statute Defined the Manner in Which the Appropriated Funds Were to Be Distributed Based Upon Need.	32
2. Plaintiffs' Claims With Respect to the Funding Mechanism in Section 37254 Do Not Support Entry of a Statewide Injunction Against the CAHSEE Graduation Requirement.	32
III. RESPONDENT ABUSED ITS DISCRETION BY BALANCING THE HARDSHIPS AGAINST THE STATE.	34

## TABLE OF CONTENTS (continued)

	Page
A. State Societal Interests and State Educational Policy Are Irreparably Injured by a Judicial Determination That High School Students Must Be Permitted to Graduate Prematurely, Before They Can Demonstrate Sufficient Academic Competency to Do So.	34
B. Respondent Erroneously Concluded That Students Would Suffer Irreparable Harm if They Are Not Permitted to Graduate With their Class.	35
CONCLUSION	36
CERTIFICATE OF WORD COUNT	38

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Butt v. State of California</i> (1992) 4 Cal.4th 668	2, 17-23, 25, 27, 28, 30, 36
<i>County of Sacramento v. Hickman</i> (1967) 66 Cal.2d 841	10, 16
<i>Falahati v. Kondo</i> (2005) 127 Cal.App.4th 823	33
<i>Intel v. Hamidi</i> (2003) 30 Cal.4th 1342	30
<i>People ex rel. Lockyer v. Sun Pacific Farming</i> (2000) 77 Cal.App.4th 619	26
<i>Planned Parenthood Golden Gate v. Garibaldi</i> (2003) 107 Cal.App.4th 345	21, 31
<i>San Francisco Unified School District v. Johnson</i> (1971) 3 Cal.3d 937	10, 16
<i>Serrano v. Priest (Serrano I)</i> (1971) 5 Cal.3d 584	2, 16-21, 23, 25, 36
<i>Serrano v. Priest (Serrano II)</i> (1977) 18 Cal.3d 728	18, 19, 21, 23, 27, 34
<i>State Board of Education v. Honig</i> (1993) 13 Cal.App.4th 720	21
<i>Thayer v. Madigan</i> (1975) 52 Cal.App.3d 16	28
<i>Vehicular Residents Assn. v. Agnos</i> (1990) 222 Cal.App.3d 996	28

## TABLE OF AUTHORITIES (continued)

	Page
<i>Wulffen v. Dolton</i> (1944) 24 Cal.2d 891	31
<b>Constitutional Provision</b>	
California Constitution, article VI, section 10	10
<b>Statutes</b>	
Code of Civil Procedure	
§ 430.80(a)	33
§ 527(b)	30
Education Code	
§ 8531	22
§ 32381(a)	22
§ 33301	22
§ 35160	22
§ 37252(a)	6
§ 37252(e)	7
§ 37254	7, 33
§ 37254(b)	32
§ 37254(c)	32
§ 51224.5(b)	2, 24
§ 51225.3	22, 24
§ 51225.5	22
§ 51410 et seq.	22
§ 52310	22
§ 52507	22
§ 52508	22
§ 60850(a)	6
§ 60851(a)	1, 6, 10, 17, 20, 26, 33
§ 60851(b)	6
§ 60851(f)	7
§ 60852.3	30
§ 60859, subd. (a)	6

## TABLE OF AUTHORITIES (continued)

	Page
§ 60859, subd. (b)	22
<b>Court Rules</b>	
California Rules of Court	
rule 56(a)	10
rule 56(b)(1)	11,16
<b>Other Authorities</b>	
California Code of Regulations	
tit. 5, § 1204.5	6
tit. 5, § 1634	22
tit. 5, § 1650	22
Historical and Statutory Notes, Education Code, § 60850 (West)	6

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**JACK O' CONNELL, in his official capacity as  
Superintendent of Public Instruction in California; the  
STATE OF CALIFORNIA; the CALIFORNIA  
DEPARTMENT OF EDUCATION; and the  
CALIFORNIA STATE BOARD OF EDUCATION,**

Petitioners,

v.

**SUPERIOR COURT OF ALAMEDA COUNTY,**

Respondent,

**LILIANA VALENZUELA, et al.,**

Real Parties in Interest.

**INTRODUCTION**

This petition presents an urgent issue of tremendous statewide importance: may a trial court order injunctive relief excusing all public high school seniors in California from a state graduation requirement in order to address allegations of inequalities in educational opportunities, absent any allegation (or finding) that the state requirement itself is unconstitutional?

In this case, the graduation requirement is section 60851, subdivision (a), of the Education Code, which mandates that students pass the California High School Exit Examination (CAHSEE) in order to receive a diploma and graduate. To pass the CAHSEE, students must correctly answer 60% of the questions on an English Language Arts (ELA) section, which tests up to 10<sup>th</sup> grade standards, and 55% on a mathematics section, which tests up to 7<sup>th</sup> grade standards, plus algebra. Students have six opportunities to pass this exam, beginning in 10<sup>th</sup> grade, and school districts are required to offer

supplemental instructional programs to those in need.

Respondent found nothing unreasonable about the CAHSEE itself, but concluded that the plaintiff students, real parties here, had a reasonable likelihood of demonstrating that they had been denied equality of educational opportunity. But, rather than compel the State or districts to take *remedial* action as might be expected if the allegations of inequality were well-founded, respondent *excused* the named plaintiffs – and every other public high school student in the Class of 2006 – from having to satisfy the CAHSEE graduation requirement at all.

Respondent premised its injunction on two of this Court’s decisions, *Butt v. State of California* (1992) 4 Cal.4th 668 (*Butt*) and *Serrano v. Priest* (1971) 5 Cal.3d 584 (*Serrano I*). In *Butt*, this Court affirmed an order that required the State to take remedial action to prevent early closing of all schools in a district as necessary to further the State’s interest in equality of basic educational opportunity. In contrast, respondent ordered the State to *lower its educational standards* for at least this year in purported furtherance of the same state policy.

Though the focus of this case is on the CAHSEE, the logic of respondent’s order could as well apply to every other educational competency standard that the Legislature establishes, for example, the State’s algebra requirement. (Ed. Code, § 51224.5, subd. (b).) Petitioners and school districts throughout the state need to have dispositive resolution of whether, in purported redress of inequality of educational opportunity, trial courts have jurisdiction to lower or nullify statutory educational competency standards so that students may receive diplomas (or, in other circumstances, be promoted to the next grade).

Graduation ceremonies will be starting later this month (May). High school students, school districts, and the State need an immediate and

dispositive resolution of whether public high school students in the Class of 2006 must be permitted to graduate without demonstrating academic competency required by law. A stay of respondent's order *will not* mean that the named plaintiffs or other high school seniors in California will be precluded from "walking" with their peers during high school graduation ceremonies; that is a ceremonial matter left to local school districts to decide (and, in fact, named plaintiffs' school districts will permit students who have not passed the CAHSEE to "walk"). And, a stay *will not* mean that students in the Class of 2006 who have not passed the CAHSEE will never receive a high school diploma; such students have many options, including to continue to study and receive a diploma when they pass the CAHSEE. A stay *will*, however, further society's interest in ensuring that students demonstrate minimal academic proficiency in order to receive a high school diploma. And a stay is essential to preserve the status quo until the Court can decide the substantive issues. Absent a stay, the issue presented soon will become moot.

## **PETITION**

### **A. Beneficial Interest of Petitioner; Capacities of Respondent and Real Parties In Interest.**

1. Petitioners are state entities: Jack O'Connell, Superintendent of Public Instruction (Superintendent); the State of California; the California Department of Education (Department); and the California State Board of Education (State Board). Petitioners were defendants in an action now pending in the respondent court, *Valenzuela v. O'Connell*, JCCP 4468.

2. Respondent is the Superior Court of the State of California in and for the County of Alameda.

3. The real parties in interest are seven students in the Class of 2006 and

their parents, all of whom were plaintiffs below.<sup>1/</sup> The seven student-plaintiffs are Mayela Barragan, Noemi Cervantes (a/k/a Noemi Acosta), Laura Echavarria, Mayra Ibanez, Ahmed Abd El Rahman, Alex Sellman and Liliana Valenzuela.

4. Real parties purport to represent an uncertified class consisting of “those high school students in California public schools who are scheduled to graduate with the Class of 2006 and who have satisfied all of their requirements for graduation except for passing the exit exam.” (Vol. I, AA00045:12-14.) The class exempts students with disabilities who are members of a different (certified) class, *Kidd v. California Department of Education*, pending in Alameda Superior Court. (Vol. I, AA00045:14-16.)

5. While seven students remain as undismissed named plaintiffs as of the writing of this petition, only five named plaintiffs continue to have “live” claims:

a. Sellman’s claims are moot because he satisfied the requirement to pass both sections of the CAHSEE while this lawsuit was pending. (Vol. XXII, AA05349:18-20.)

b. Barragan is not a member of the putative class and cannot state a claim because she is credit deficient. As a recent immigrant, she has not been in high school in California long enough to satisfy the course requirements for graduating with the Class of 2006. (Vol. XXII, AA05384-5386, 05395:6-12, 05398.)

6. The five remaining named plaintiffs below (Cervantes, Echavarria, Ibanez, Rahman, and Valenzuela) all recently immigrated to the United States, arriving variously between 2000 and 2004. (Vol. I, AA00040-41,

---

1. The lawsuit initially was filed on behalf of ten students and their parents. (Vol. I, Tab 2.) Plaintiffs have requested or obtained dismissal of three of the students (and their parents) for unstated reasons. (Vol., I, Tab 5; Vol. II, Tab 17; Vol. IX, Tabs 92 & 93; Vol. XXXI, Tab 167.)

00042:5-6, 00043:9-10; Vol. XXII, AA05440, 05469, 05507.) English is not their native or primary language. (Vol. I, AA00040:22, 00041:2, 00043:28; Vol. XXII, A05408, 05466.) They have all been classified as English learners (ELs) by their school districts, as is reflected by their enrollment in English Language Development (ELD) classes. (Vol. XXII, AA05426, 05456, 05489, 05518, 05549; Vol. XXI, AA05227-05228.)

7. Cervantes, Echavarria, Ibanez, and Valenzuela all attend Richmond High School.<sup>2/</sup> (Vol. I, AA00040:14; AA00042:4; 00043:1-2, 25-26.) Rahman attends Newark Memorial High School. (Vol. I, AA00040:27-28.)

8. None of the real parties has alleged that he or she personally has been denied educational equality, or that a lack of educational equality is why they have failed the CAHSEE. (See Vol. I, AA00040-44.) Instead, they concede that the reason they cannot pass the CAHSEE is their lack of English skills. (Vol. VII, AA01633:11-13; Vol. VIII, AA01998:28; Vol. X, AA02419:13-15; Vol. XXII, AA05407:19-24; see also Vol. III, AA00740:12-14; Vol. XXII, AA05450: 13.)

9. The boards of the school districts attended by the remaining real parties have decided to permit students who have not passed the CAHSEE to participate in graduation ceremonies and receive certificates of completion if they meet various requirements. (Vol. , XII, AA03029; Vol. XX, AA05173; Vol. XXII, AA05415:14-19.)

10. Cervantes, Echavarria, Ibanez, and Valenzuela took the March 2006 CAHSEE and are awaiting results. (Vol. XII, AA05413, 05447-05448, 05473, 05502.) While plaintiffs had an additional opportunity to take the CAHSEE this month, no results are yet available. (Vol. XXX, AA07453.)

---

2. One other named plaintiff, Mayela Barragan, also attends Richmond High School. (Vol. I, AA00044:12.)

## **B. The CAHSEE Graduation Requirement.**

11. In March 1999, the Legislature enacted legislation requiring the Superintendent, with the approval of the State Board, to develop a high school exit examination in English language arts and mathematics. (Ed. Code, § 60850, subd. (a).) Its purpose, as expressed by the Legislature, was to ensure that high school graduates could demonstrate competency with state standards in reading, writing and mathematics, as opposed to satisfying purely local standards. (Historical and Statutory Notes, Ed. Code, § 60850 (West).)

12. Initially, the Legislature intended that all students starting with the Class of 2004 would be required to pass the CAHSEE in order to graduate from high school. (Ed. Code, § 60851, subd. (a).) However, in July 2003, pursuant to an express grant of authority from the Legislature, the State Board voted to delay the graduation requirement for two years, to the Class of 2006. (*Id.*, § 60859, subd. (a); Vol. III, AA00516:15-23, A00556.)

13. The English Language Arts (ELA) section of the CAHSEE tests up to 10th grade standards in reading and writing, while the math section tests up to 6th and 7th grade standards, plus algebra. (Vol. XVI, AA03888:1-10.) To pass, a student must answer 60% of the ELA questions and 55% of the math questions correctly. (*Id.*, AA003888:12-15.)

14. Each student must take the exam in 10th grade. (Ed. Code, § 60851, subd. (b).) Those who do not pass both sections of the test at that time have five additional opportunities to pass before the end of their senior year – twice in 11th grade, and three times in 12<sup>th</sup> grade. (Cal. Code Regs., tit. 5, § 1204.5.)

15. The Legislature requires local school districts to offer “supplemental instructional programs for pupils . . . who do not demonstrate sufficient progress toward passing the exit examination.” (Ed. Code, § 37252, subd.

(a); see also *id.*, § 60851, subd. (f).) These programs may be offered during the summer, before school, after school, on Saturday, and during intercession. (*Id.*, § 37252, subd. (e).)

16. In the Fall of 2005, the Legislature appropriated \$20 million in supplemental funds to go to school districts that had schools with the highest percentage of students in the Class of 2006 who had not passed the CAHSEE. (Ed. Code, § 37254; Vol. XXIII, AA005581-5582.) Based on a funding mechanism specified by the Legislature, districts that had schools with 28 % or more eligible pupils became eligible for the funds. (Ed. Code, § 37254; Vol. XXIII, AA05582:2-12.)

17. The CAHSEE's success is reflected in the ever-increasing pass rates for the students in the Class of 2006. While only 69% of students in the Class of 2006 were able to pass both sections of the CAHSEE when they first took it in the 10th grade, the number has grown to 89% (an increase of 29%) through February 2006, with the results from the March and May administrations still pending. (Vol. XVI, AA04050.) More dramatic has been the improvement in pass rates for particular subgroups: economically disadvantaged students (from 55% in 10th grade to 82% through February 2006, an increase of 49%); Hispanic students (from 56% to 72%, an increase of 29%); African American students (from 52% to 80%, an increase of 54%); and English Learner students (from 36% to 69%, a 92% increase). (*Ibid.*) Based on more recent statistics, those numbers have improved further still. (Vol. XXX, AA07454.)

18. Through the February 2006 administration of the CAHSEE, approximately 47,000 students in the Class of 2006 still had not passed one or both parts of the CAHSEE. (Vol. XXX, AA07453.)

19. Students who do not pass CAHSEE by the end of their senior year have at least nine options if they wish to complete their education and

receive a high school diploma or diploma equivalent. (Vol. XXI, AA05328-5330.) These options include:

- a. receive remedial supplemental instruction that could be provided both during the regular academic year and “for at least one year following completion of grade twelve”;
- b. enroll for an additional year in a public comprehensive high school or alternative education program in the district (which may include reclassifying credit-deficient seniors as juniors);
- c. enroll in an independent study program;
- d. enroll in a charter school;
- e. attend adult school;
- f. obtain a diploma from a community college;
- g. obtain a diploma through a county court or community school program;
- h. pass the California High School Proficiency Exam; and
- i. pass the General Educational Development (GED) test.

(*Ibid.*) Alternatively, students may enroll in a community college and then transfer to a four-year college once they have sufficient credits. (Vol. XII, AA03026-3027.)

### **C. Chronology of Pertinent Events.**

20. Real parties filed their Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief (Verified Petition and Complaint) in San Francisco Superior Court on February 8, 2006. (Vol I, Tab 2.)

21. On February 22, 2006, petitioners filed a Petition to Coordinate the case with *Kidd v. California Department of Education* in Alameda Superior Court. The petition was granted on March 30, 2006. (Vol. XI, Tab 84). Respondent was assigned as the coordination trial judge on April 3, 2006.

(Vol. XI, Tab 94.)

22. On March 17, 2006, defendants demurred to the Verified Petition and Complaint. (Vol. III, Tab 23.) After a hearing, the court issued an order on April 19, 2006 sustaining the demurrer for the State of California against a cause of action not at issue here, and overruled the demurrer in all other respects. (Vol. XI, Tab 95.) The trial court denied defendants' request for a statement of decision. (Reporter's Transcript of Proceedings, April 14, 2006, p. 42:17.)

23. On March 23, 2006, plaintiffs filed their motion for a preliminary injunction. (Vol. III, Tab 26) The parties fully briefed the motion. (Vol. III, Tab 27; Vol. XII, Tab 103; Vol. XXVII, Tab 135.) Defendants filed written objections to much of plaintiffs' evidence. (Vol. XXX, Tab 165.) Plaintiffs offered no objections to defendants' evidence.

24. On May 9, 2006, respondent court heard argument on plaintiffs' motion for preliminary injunction. (Reporter's Transcript of Proceedings, May 9, 2006.) The court indicated on the record that it was inclined to grant the motion on the basis that plaintiffs had demonstrated a likelihood of success on their equal protection claim. (*Id.*, pp. 2-6, 48:25-26; see also Vol. XXXI, Tab 166.) However, the court requested additional briefing on the scope of any preliminary injunction. (*Id.*, pp. 48-49.)

25. Defendants filed their post-hearing brief on May 10, 2006. (Vol. XXXI, Tab 169.) Plaintiffs filed theirs on May 11, 2006. (*Id.*, Tab 171.)

26. The trial court granted plaintiffs' motion for preliminary injunction on May 12, 2006. (Vol. XXXI, Tab 174.) The injunction states as follows:

Superintendent for Public Instruction, State Department of Education, State Board of Education and State of California are enjoined and restrained, during the pendency of these proceedings, from denying any high school senior who is a member of a 2006 graduating class and who is otherwise eligible to graduate and receive a diploma from participating in graduation exercises and receipt of

such diploma solely on the grounds that such student has not passed all parts of the CAHSEE.

(Vol. XXXI, AA007633.) A copy of this order is attached to this petition as Exhibit A.

27. On May 12, 2006, the trial court denied the State's request for a limited stay of its order. (Vol. XXXI, Tab 176.)

**D. Basis for Relief.**

28. Respondent exceeded its jurisdiction and abused its discretion by enjoining the CAHSEE graduation requirement, codified in Education Code section 60851, subdivision (a), as to all students statewide in the Class of 2006 who have not passed the CAHSEE but have satisfied all other requirements for graduation.

**E. Justification for Seeking Relief in this Court in the First Instance and Inadequacy of Appeal as a Remedy.**

29. This is a case of significant statewide interest. Education is a fundamental and compelling concern in California. If respondent's injunction is permitted to stand, it will impair that interest, by lowering the academic standards for graduation for thousands of high school seniors across the state, and undermining the efforts of educators to improve academic achievement for all students. The unusual public interest in the lawsuit, and the issues it raises, justify an immediate disposition of the issues presented.

30. This Court has original jurisdiction in proceedings for extraordinary relief in mandamus and certiorari under California Constitution, article VI, section 10 and Rules of Court, rule 56(a). Jurisdiction may be exercised where "the issues presented are of great public importance and must be resolved promptly." (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845; *San Francisco Unified School District v. Johnson* (1971) 3 Cal.3d

937, 944-945; Cal. Rules of Court, rule 56(b)(1).)

31. The issues presented in this case are appropriate for resolution by this Court in the first instance because they call for construction of two of this Court's most important and most cited precedents (*Butt* and *Serrano*) and a determination whether this Court's precedent justifies the trial court's sweeping order.

32. Appeal is an inadequate remedy. The issues must be determined on an unusually expedited basis because members of the Class of 2006 will start to graduate later this month. An ordinary appeal would not provide a vehicle to obtain a dispositive ruling from this Court within the limited time available.

#### **F. Irreparable Harm.**

33. Injury to petitioners, to students who have not yet passed the CAHSEE, and to educational policy in the State of California, would be "irreparable" absent immediate relief. If the trial court's order is permitted to stand, students will graduate later this month (i.e., in late May) without demonstrating the academic competency for doing so, in clear violation of legislative policy.

#### **G. Need For Immediate Stay.**

34. An immediate stay of the trial court's order is critically necessary to preserve the credibility of the State's educational accountability system. (Gaskill Decl., ¶ 4, Lee Decl., ¶ 6.)<sup>3/</sup> If the trial court's order were not reversed or modified until sometime later this year, that would be too late to bring members of the Class of 2006 back into the educational fold, and too late for members of the Class of 2007 who must make decisions now as to how *or whether* to prepare for the next administration of the CAHSEE this

---

3. Declarations in support of this petition and request for immediate stay are attached in alphabetical order as Exhibit B to this petition.

July or upon their return to school this Fall. (O'Connell Decl., ¶ 3.)

35. For educators, an immediate stay is critical to enable them to plan for and allocate their remedial education resources rationally. They must decide now whether to hold summer school; whether to hire teachers for such summer classes; and even more immediately, who may graduate this May and June and in what capacity, as some individual school districts have adopted the CAHSEE as a *local* proficiency requirement as well. (Lopez Decl., ¶ 3; Lee Decl., ¶ 4.)

36. An immediate stay also is essential to ensure that students in the Class of 2006 and later classes do not forego opportunities to participate in CAHSEE remediation classes this summer. There already are reports that students in the Class of 2006 (and even the Class of 2007) may forego educational opportunities as a result of the trial court's order, on the belief that they no longer have to pass the CAHSEE. (O'Connell Decl., ¶ 3, Lee Decl., ¶ 6.) Further, absent a stay, educators anticipate great difficulty convincing future classes of students of the significance and value of the CAHSEE and its remediation programs. (O'Connell Decl., ¶¶ 4, 5; Lopez Decl., ¶ 4; Gaskill Decl., ¶ 4.)

#### **H. Authenticity of Exhibits.**

37. All exhibits accompanying this petition, except the exhibits attached directly to this petition as Exhibit A, are true copies of original documents on file with respondent court. The exhibits are incorporated herein by reference as though fully set forth in this petition. The exhibits are paginated consecutively from page 00001 through page 07652, and page references in this petition are to the consecutive pagination.

## **PRAYER**

Petitioners pray that this Court:

1. Issue an immediate stay of respondent court's order;
2. Issue an alternative writ directing respondent superior court to set aside and vacate its order granting plaintiffs' motion for preliminary injunction, or to show cause why it should not be permanently ordered to do so;
3. Upon return of the alternative writ, issue a peremptory writ of mandate and/or certiorari, or such other extraordinary relief as is appropriate, directing respondent superior court to set aside and vacate its order of order of May 12, 2006, granting plaintiffs' motion for preliminary injunction, and to enter a new and different order denying the motion;
4. Award petitioners their costs of suit; and
5. Grant such other relief as may be just and proper.

May 19, 2006

Respectfully submitted,

BILL LOCKYER  
Attorney General of the State of California

JAMES M. HUMES  
Chief Assistant Attorney General

MANUEL M. MEDEIROS  
Solicitor General


THOMAS R. YANGER  
Senior Assistant Attorney General

KARA READ-SPANGLER  
Deputy Attorney General

HADARA R. STANTON  
Deputy Attorney General



DOUGLAS M. PRESS  
Supervising Deputy Attorney General



KARIN S. SCHWARTZ  
Deputy Attorney General

Attorneys for Petitioners

## VERIFICATION

I, Karin Schwartz, declare as follows:

I am one of the attorneys for the petitioners herein. I have read the foregoing Petition for Writ of Certiorari and/or Mandate or Other Extraordinary Relief and know its contents. I am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than petitioners, verify this petition. Further, pursuant to Code of Civil Procedure section 446, this Petition need not be verified.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on May 19, 2006, at San Francisco, California.

A handwritten signature in black ink, appearing to read "Karin S. Schwartz", is written over a horizontal line.

Karin S. Schwartz

## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

#### **RELIEF FROM THIS COURT IN THE FIRST INSTANCE IS ESSENTIAL TO RESOLVE AN ISSUE OF URGENT STATEWIDE IMPORTANCE**

##### **A. The Issue Is of Statewide Importance and Threatens to Become Effectively Moot in the Absence of Immediate Relief by this Court.**

This Court's immediate review is justified by the importance and urgency of the issues at stake. (*County of Sacramento v. Hickman, supra*, 66 Cal.2d at p. 845; *San Francisco Unified Sch. Dist. v. Johnson, supra*, 3 Cal.3d at pp. 944-945 [issues "are of great public concern and importance; their prompt resolution is essential to orderly planning and pupil assignment not only in San Francisco but throughout the state"]; Cal. Rules of Court, rule 56(b)(1).)

Education is a fundamental public interest in California (*Serrano I*, 5 Cal.3d at pp. 608-609.) If respondent's injunction stands, it will impair that interest by irrevocably lowering academic standards statewide for the Class of 2006. Further, it will remove the most powerful incentive available to the State to motivate students – including those in the Class of 2006 – to continue to learn and master material deemed essential by the Legislature for graduation from public high school. The court's order is impairing the public interest in education already, as it is causing students to question the need to enroll in summer school programs designed to teach the material tested by the CAHSEE. The unusual public interest in the lawsuit, and the imminency of harm to that interest, justify an immediate disposition of the issues presented.

Absent a stay or prompt decision by this Court, the issue presented will become moot. Under the trial court's order, tens of thousands of

students may graduate in the next few weeks who have not passed both sections of the CAHSEE. It is unreasonable to expect that, once they receive their diplomas, any students ever will be required to return them (or acquire more education to retain them). Thus, absent relief, the Legislature's mandate in section 60851, subdivision (a), will not apply to the Class of 2006.

**B. This Court's Immediate Consideration Is Required to Clarify That Courts May Not Rely on *Butt* and *Serrano* as Authorization to Excuse Students Statewide from Educational Standards as a Purported Remedy for Alleged Inequality of Educational Opportunities.**

Immediate review by this Court, in the first instance, is appropriate because the purely legal issue presented by this petition depends on clarification of two of this Court's most important precedents. The issue presented is whether this Court's decisions authorize injunctive relief excusing all high school students in the Class of 2006 statewide from a state graduation requirement in order to address allegations of inequalities in educational opportunities, absent any allegation (or finding) that the state requirement itself is unconstitutional. The sole substantive support that the trial court cited for this unprecedented form of relief were this Court's decisions in *Butt* and *Serrano I*. Respectfully, this Court should grant the writ in order to clarify that its decisions in *Butt* and *Serrano I* do not authorize the sweeping relief ordered by the trial court in this case.

**C. Petitioners Have No Plain, Speedy, or Adequate Remedy in the Ordinary Course of Law to Redress an Irreparable Injury to Legislatively Mandated Educational Policy.**

Petitioners have no plain, speedy, or adequate remedy. The issue raised will be determined on its merits, or not at all, within the next two weeks, given that members of the Class of 2006 will start to graduate in late May

2006. An appeal would not provide a vehicle to obtain a ruling from this Court within two weeks. The injury to state educational policy would be irreparable because, as noted above, once diplomas are issued, the legal issue that this petition presents will be moot.

## **II.**

### **RESPONDENT EXCEEDED ITS JURISDICTION BY EXCUSING ALL HIGH SCHOOL SENIORS STATE-WIDE FROM THE EXIT EXAM REQUIREMENT FOR GRADUATION**

#### **A. Nothing in this Court’s *Butt* and *Serrano* Decisions Supports Respondent’s Usurpation of the Legislature’s Power to Set Educational Policy.**

This Court has made clear that a trial court may direct the State to intervene to equalize educational opportunities (on a proper showing) where a plaintiff establishes a denial of equal protection based on a lack of educational equality. However, this Court has never held that a trial court may “legislate” a specific form of relief, here, a waiver or delay of a state-mandated requirement for graduation. The orders considered in *Butt v. State of California* (1992) 4 Cal.4th 668 and *Serrano v. Priest* (1971) 5 Cal.3d 584 (*Serrano I*) and (1977) 18 Cal.3d 728 (*Serrano II*) merely directed the State defendants to achieve a result (educational equality), but expressly did not specify the manner – a point emphasized by this Court.

##### **1. The Orders Affirmed by this Court in *Serrano* and *Butt* Directed the State to Achieve a Result But Left the Manner to the State’s Discretion.**

In *Serrano I* and *Serrano II*, this Court considered whether the State’s school financing scheme, which was largely dependent on local property taxes, violated equal protection guarantees under the state and federal

constitutions. In *Serrano I*, the Court held that plaintiffs had stated a claim and reversed the trial court's order sustaining defendants' demurrer. Following remand, the trial court held that the financing scheme was unconstitutional under state equal protection provisions because it unconstitutionally denied educational opportunities on account of wealth. (*Serrano II*, 18 Cal.3d at pp. 748-749.) Accordingly, the trial court "set a period of six years" from entry of judgment for defendants to "bring the system into constitutional compliance," but permitted the existing system to operate until such compliance was achieved. (*Id.* at p. 749.) In *Serrano II*, this Court affirmed the trial court's order. In doing so, this Court acknowledged the pains taken by the trial court not to mandate a specific method to achieve compliance:

The judgment specifically provided that it was not to be construed to require the adoption of any particular system of school finance, but only to require that the plan adopted comport with the requirements of state equal protection provisions.

(*Id.* at pp. 749-750.) Thus, as this Court explained, the trial court "explicitly and properly refrained from issuing directives to the lawmakers and the chief executive." (*Id.* at p. 752.)

The trial court in the *Butt v. State of California* (1992) 4 Cal.4th 668 showed similar restraint and deference to the executive branch as a co-equal branch of government. At issue in *Butt* was the decision of Richmond Unified School District to shut its schools six weeks early due to financial insolvency. (*Id.* at p. 673.) The trial court held that the State was required to ensure that students in the district received an education that was "basically equivalent" to that provided elsewhere in the state. (*Id.* at p. 675.) Accordingly, the trial court "ordered the State and the SPI [the Superintendent] to act as 'they deem appropriate'" to either "ensure that the District schools remained open" or to provide "District students with a

‘substantially equivalent educational opportunity.’” (*Ibid.*) Again, this Court emphasized the open-ended nature of the relief directed: the trial court’s “orders made clear that ‘[h]ow these defendants accomplish this is up to the discretion of defendants.’” (*Id.* at p. 694.) Ultimately, the issue was resolved by an emergency loan from the State to the district of \$19 million in aid. (*Ibid.*)

**2. The Remedy Ordered by Respondent in this Case –  
Issuance of Diplomas – Is Incompatible with *Serrano* and  
*Butt*.**

*Butt* and *Serrano* do not support the trial court’s order in the present case, which far exceeded respondent’s jurisdiction. As in *Butt* and *Serrano*, respondent was presented with a claim that the State, by action or inaction, had failed to provide all students across the state with equal educational opportunities (the Verified Petition and Complaint was concerned primarily with students’ access to certified teachers and school district’s access to \$20 million in supplemental funds earmarked by the legislature for further remediation). However, respondent did not simply order defendants to take steps to equalize those opportunities, and leave the manner of doing so to their discretion, as occurred in *Serrano* and *Butt*. Rather respondent ordered the State to allow students in the Class of 2006 who have not satisfied a state-mandated requirement for graduation, to participate in graduation exercises and receive diplomas.

Respondent did so despite its acknowledgment that plaintiffs were “not challenging the CAHSEE” requirement per se. (Vol. XXXI, AA07627.<sup>4/</sup>) Instead, respondent lifted the CAHSEE graduation requirement

---

4. And, indeed, plaintiffs’ Verified Petition and Complaint contains *no mention* of, let a specific challenge to, the statute that codified that requirement, Education Code section 60851, subdivision (a). (Vol. I, Tab 2; see also Vol. XXXI, AA07625 [issue presented by case is “whether the Equal protection

as a *remedy* for educational inequalities, independent of any challenge to the validity of the CAHSEE itself.

It has never been the law in this State, and it should not be the law, that relief from an academic requirement is a judicial remedy for allegedly unequal educational opportunities. If that were the law, then the trial court in *Butt* could simply have ordered defendants to promote the students in Richmond High School to the next grade rather than ensure that they received equivalent opportunities to other students. Under *Butt* and *Serrano*, however, the remedy for an education-based deprivation is to enhance the educational opportunities for those who purportedly have been treated unfairly: the remedy is *more* education, not less.

**3. The Remedy Ordered by Respondent in this Case –  
Issuance of Diplomas – Is Incompatible with Separation of  
Powers.**

By going beyond what this Court approved in *Butt* and *Serrano*, respondent invaded the province of the legislative and executive branches in violation of separation of powers principles. A court is only “charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.” (*Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 354 [citing *Madsen v. Women’s Health Ctr.* (1994) 512 U.S. 753, 762].) If a party identifies an educational inequality, it may be appropriate for a court to direct defendants to address it, but the means should be left to their discretion, as it was in *Serrano* and *Butt*. This is because the Legislature has delegated to defendants the power to develop and implement educational policy in California. (*State Board of*

---

clause permits denial of equal education opportunity, *resulting* in failure to pass the CAHSEE,” emphasis added]; Vol. XXXI, AA07629 [“Here, the test itself is not so much under attack as the provision of educational resources needed to adequately prepare students to take the exam”].

*Education v. Honig* (1993) 13 Cal.App.4th 720, 753, 766; Ed. Code, § 33301; see also *Butt*, 4 Cal.4th at p. 695 [“principles of comity and separation of powers place significant restraints on courts’ authority to order or ratify acts normally committed to the discretion of other branches or officials”].)

The separation-of-powers problems with respondent’s chosen remedy go far beyond a mere lack of deference to legislative and executive policymaking prerogatives. The Legislature has prohibited by statute any further delay in the CAHSEE graduation requirement beyond that approved by the State Board in July 2003. (Ed. Code, § 60859, subd. (b).) Accordingly, respondent’s order seeks to accomplish a result (equalization of educational activities) through a method that the Legislature itself has rejected (delay of the CAHSEE).

Respondent’s order invades the Legislature’s educational policy prerogative in yet another way. It purports to prevent state entities (the Department, State Board and Superintendent) from denying certain public high school students a diploma and opportunity to participate in graduation exercises. (Vol. XXXI, AA07633.) However, pursuant to express legislative delegation, the authority to issue diplomas to public high school students lies not with petitioners, but with the governing boards of the high school districts, who were not sued in this action. (Ed. Code, §§ 35160 et seq, 51411 & 51412; Cal. Code Regs., tit. 5, § 1650; see also Ed. Code, §§ 8531, 32381, subd. (a), 51225.3, 51225.5, 52310, 52507, 52508; Cal. Code Regs., tit. 5, § 1634.) The Legislature did not provide petitioners with the power to issue diplomas to public high school students. The court may not reassign that power to the State for purposes of this lawsuit.<sup>5/</sup>

---

5. This problem arises in part from plaintiffs’ failure to sue *both* the state *and* the relevant local entities, which is what plaintiffs did in *Butt* and

If there is a problem with equality of educational opportunities, then the State should be allowed both time *and* discretion to fix it. The order upheld by this Court in *Serrano II* provided defendants with six years to implement a new funding scheme to address any inequalities. (18 Cal.3d at p. 749.) It did so on the basis of this Court’s observation, in *Serrano I*, that a finding of unconstitutionality does not require “immediate[] implementation of a constitutionally valid substitute.” (5 Cal.3d at p. 619.) Rather, a court may “provide for enforcement of [any] judgement in such as way as to permit an orderly transition from an unconstitutional to a constitutional system.” (*Ibid.*) By contrast, in the present case, the court ordered *immediate* relief, of an unconstitutionally specific nature, to take effect less than four months after plaintiffs failed their suit (in February 2006). And far from facilitating any sort of orderly transition, respondent’s order has created widespread confusion among students, teachers and public school administrators. (O’Connell Decl., ¶ 2; Lee Decl., ¶ 3, 5; Rivera Decl., ¶ 3.)

Finally, if respondent’s order is allowed to stand, it will provide a basis for striking *any* state-imposed academic standard, not just the CAHSEE. Simply put, if it is appropriate to strike the CAHSEE merely because students have different educational experiences, then no state educational standard is safe. There is, and always will be, some variation in students’ educational experiences, no matter how diligent the state and local districts are. (See *Butt*, 4 Cal.4th at p. 686 [recognizing “inevitable variances in local programs, philosophies and conditions”].) Other state requirements

---

*Serrano*. (*Butt*, 4 Cal.4th at p. 674 [local district’s Board of Education sued]; *Serrano I*, 5 Cal.3d at p. 589 [county officials sued in their “local capacities and as representatives of a class composed of the school superintendent, tax collector, and treasurer of each of the other counties in this state”].) Although the State pointed this issue out in connection with their demurrer and again in their opposition to the motion for preliminary injunction, the court chose to disregard it. (Vol. XI, 02628-2629; Vol. XII, AA02949.)

left vulnerable by the trial court's ruling include that all students pass Algebra I; three courses in English; two courses in math; and two courses in science. (Ed. Code, §§ 51224.5(b), 51225.3.)

#### **4. Relieving an Academic Requirement to Address Educational Inequalities Is Bad Policy.**

Respondent's decision to lower academic standards in California to address its concern over disparity of resources is bad policy. This may be the first case of its kind: a state law that has caused school districts to offer more courses and motivated students to learn more skills deemed essential to a high school education (and to success in life) has been negated by a court in the name of educational equality. Whatever the basis for respondent's concern about ensuring equity in education, it chose the wrong means for addressing it as a matter of law *and* policy.

The CAHSEE graduation requirement is more than just a test; it is an essential component of an educational program designed to redress the very educational inequality about which respondent was concerned. The combination of remediation opportunities, multiple opportunities to take the test, and the graduation requirement, are designed to assure that *all* California public high school seniors have a minimum level of education.

The CAHSEE requirement is a success as an education equalizer, as confirmed by the ever-increasing pass rates for students in the Class of 2006. The overall pass rates for the Class of 2006 have improved substantially (by 29% through February 2006) since its members first took the CAHSEE in 10th grade. (Petition, ¶ 17.)<sup>6</sup> The most dramatic improvement has occurred among groups of concern to respondent, including economically disadvantaged students (from 55% in 10th grade to 82% through February

---

6. Citations in the Points & Authorities to "Petition" are to the Petition now before the Court (and the record cites located therein).

2006, an increase of 49%); African American students (from 52% to 80%, an increase of 54%), and English Learner students (from 36% to 69%, a 92% increase). (*Ibid.*) Thus, whatever educational disparities may exist, the CAHSEE is working to reduce that disparity.

**B. Respondent Exceeded its Jurisdiction by Issuing a Statewide Injunction Against the CAHSEE When Plaintiffs' Claims Failed as a Matter of Law.**

Far from demonstrating a likelihood of success to support an injunction, plaintiffs' claims failed as a matter of law. While respondent committed numerous evidence-based errors, petitioners focus here solely on purely legal issues that are dispositive as a matter of law.

**1. A Naked Allegation of Unequal Educational Opportunities Is Insufficient to State an Equal Protection Claim.**

The novel type of equal protection theory asserted by plaintiffs here, and adopted by respondent, does not even state a claim, let alone support statewide injunctive relief. According to respondent, the "common question" that supported class-wide injunctive relief was "whether the Equal Protection clause permits denial of educational opportunity, resulting in failure to pass the CAHSEE, and the denial of benefits to students who have satisfied all other requirements." (Vol. XXXI, A07625.) However, denial of equality of educational opportunity, untethered from any challenged practice, is not a cause of action. Rather, a plaintiff must identify a specific practice or statute that is unconstitutional as to some defined group of individuals: for example, a shortened school year that impacts all students in a district (*Butt*, 4 Cal.4th at p. 687) or a school funding scheme that burdens the poor (*Serrano I*, 5 Cal.3d at p. 604).

To permit a plaintiff to assert an equal protection claim based solely on amorphous allegations of unequal educational opportunity would represent an unwarranted and unsupportable expansion of equal protection

principles as a vehicle for challenging state practices. To put this in perspective, applying the theory asserted by plaintiffs, respondent enjoined a state statute (section 60851, subdivision (a)) without conducting *any* analysis as to (1) whether the CAHSEE graduation requirement is rationally related (or even necessary) to achieve an important (or compelling purpose); (2) whether the CAHSEE graduation requirement burdens a defined class<sup>7/</sup> of persons in an unconstitutional manner; and (3) whether the members of the purportedly disfavored class are similarly situated with members of the nondisfavored class for purposes of the requirement at issue. (See Vol. XXXI, AA07628-07631.) These are all essential elements of an equal protection claim. (See *People ex rel. Lockyer v. Sun Pacific Farming* (2000) 77 Cal.App.4th 619, 637-638.)

Respondent apparently declined to do this analysis based on its understanding that plaintiffs were not challenging the CAHSEE graduation statute itself, but rather were basing their claims on an unequal allocation of educational resources as an equal protection violation in an of itself. Consistent with its view, respondent stated that defendants' efforts to defend the validity of the CAHSEE "demonstrates either a misunderstanding or mischaracterization" of plaintiffs' claims, since those claims were not based on any invalidity of the CAHSEE per se. (Vol. XXXI, AA07627.) Be that as it may, in so ruling respondent gave its approval to a theory of equal protection that does not even state a claim, let alone support class-wide relief.

---

7. Petitioners use the word "class" here as it is used in equal protection analysis (i.e., a group of persons subject to a statutory or other classification). They are not suggesting (and in fact have never suggested, contrary to respondent's statement in its order) that a certified class was a requirement for injunctive relief in this case.

**2. Plaintiffs Failed to Show That They Suffered Any Injury Common to a Purported Class of Students Who Are Denied Equal Protection of the Law.**

Plaintiffs' claims fail as a matter of law even under the equal protection theory enunciated by the court. The five named plaintiffs conclusively disproved the "common question" that purportedly supported statewide relief: i.e., "whether the Equal Protection clause permits denial of educational opportunity, resulting in failure to pass the CAHSEE." There was no showing that the named plaintiffs failed the CAHSEE because of a "denial of educational opportunity," let alone a showing that *all students statewide* in the Class of 2006 failed for this reason.

Beyond dispute, students fail CAHSEE for a variety of reasons having nothing to do with "denial of educational opportunity." These include lack of English language ability, lack of personal motivation, and lack of parental support. (Vol. XVI, AA03985.) The circumstances of the named plaintiffs could not have made this point more clearly. As they conceded, their difficulties with the CAHSEE were caused by their lack of English skills, not because they were denied educational opportunity. (Petition, ¶ 8.) Consistent with this, while the Verified Petition and Complaint contained numerous pleadings about the specific named plaintiffs, it did not allege that any one of them failed the CAHSEE as a result of such a denial. (See Vol. I, AA00040-00044.)

Put differently, a class that consists of *all students who have not passed the CAHSEE* cannot be considered a "burdened" or "disfavored" class for equal protection purposes. (See Petition, ¶ 4; *Butt*, 4 Cal.4th at pp. 685-686 [equal protection claim presumes existence of "disfavored class"]; *Serrano II*, 18 Cal.3d at p. 763 [similar].) No common characteristic unites these students other than the very mutable fact that they have not, at a given

point in time, passed the exit exam. Indeed, in just the last few months since the lawsuit case was filed, more than half of this group of students has passed from "disfavored" to "favored." (Compare Vol. 3, AA00733:6 [alleging that 100,000 students have not passed CAHSEE] with Vol. XXVII, A06482:13 [figure dropped to 50,000].) Such a fluid and nonhomogeneous group cannot serve as the basis for an equal protection claim. (See, e.g., *Thayer v. Madigan* (1975) 52 Cal.App.3d 16, 19; *Vehicular Residents Assn. v. Agnos* (1990) 222 Cal.App.3d 996, 1000.)

*Butt*, relied upon by respondent, does not support entry of a statewide injunction on the facts of this case. In *Butt*, parents of students in a school district (Richmond Unified) sued to vindicate the rights of students of the district in the face of the district's decision to close six weeks early. The disfavored group, thus, was easily defined and relatively fixed for the limited time period at issue (i.e., students in Richmond Unified). The school district was proposing to do something that would affect *all* students of the district in *precisely the same way* (i.e., shorten their school year by six weeks). Injunctive relief was granted *not* on a statewide basis, but solely as to the district. As such, *Butt* offers no authority for granting statewide relief as to thousands of students who have been impacted or benefitted in a many different ways by a broad variety of educational practices and policies at different schools and districts and represent a wide array of disparate personal circumstances.

In sum, respondent exceeded its jurisdiction when it entered a statewide injunction on the basis of a "common question" that was neither common to the class nor correct as to the plaintiffs before it.

**C. Respondent Exceeded Its Jurisdiction by Excusing from the Statutory Graduation Requirements Persons Who Cannot Claim to Have Been Unconstitutionally Burdened as a Result of Any State Action or Inaction.**

The injunction issued by respondent – which included *all* members of the Class of 2006 who have not satisfied the CAHSEE requirement but otherwise are on track to graduate – was fatally and irredeemably overbroad. As noted above, there are many reasons why a student may not pass the CAHSEE having nothing to do with state action or inaction, including lack of English language ability, personal motivation, and parental support. (Vol. XVI, AA03985.) However, respondent made no effort to exclude persons who failed the CAHSEE for such reasons from its injunction. Instead, respondent waived the graduation requirement for *all* students in the Class of 2006 who have not yet passed the CAHSEE (but who are on track to graduate) regardless of the reason. Accordingly, if it stands, the injunction will cause diplomas to be awarded to many students who cannot even claim to have suffered any personal deprivation of their rights.

In fact, it is entirely possible that the *majority* of students who will "benefit" from respondent's injunction are not failing the CAHSEE as a result of state action or inaction. While it is known that approximately 47,000 students in the Class of 2006 have not yet passed both parts of the CAHSEE (Petition, ¶ 18), there are no data regarding how many of these students are credit deficient (like Mayela Barragan) or cannot graduate for other reasons. Of those who remain and therefore may "benefit" from the injunction, there is no way to know what the reasons were for their failure to pass the CAHSEE to date. Respondent itself recognized this fact, but entered the injunction anyway. (Vol. XXXI, AA07633 ["The Court recognizes that the relief requested herein may inure to the benefit of some class members whose failure to pass the CAHSEE was not caused by these

factors."].)

In response to these and similar arguments raised by petitioners below, the court stated that Code of Civil Procedure section 527, subdivision (b), was “dispositive” on the propriety of class-wide relief. (Vol. XXXI, AA 07624.) In fact, section 527 does not provide any independent authority for ordering class-wide relief. It merely states that a preliminary injunction may be ordered in a class action (certified or not) “upon the same grounds as in other actions.”

The injunction is overbroad for another reason: it does not, at least on its face, exclude students with disabilities in the Class of 2006. But plaintiffs expressly excluded such students in their class allegations because those students are plaintiffs in a separate class action *Kidd v. California Department of Education*, pending in Alameda Superior Court. (Petition, ¶ 4.) Further, earlier this year, the Legislature enacted a statute, Education Code section 60852.3, that authorized exemptions from the CAHSEE requirement for such students under certain conditions (e.g., that they availed themselves of remediation). But if students with disabilities are encompassed within the injunction issued by the court, then section 60852.3 is a nullity – an improper result given that plaintiffs never challenged that statute (nor would they have standing to do so).

The broad sweep of this injunction cannot be reconciled with the notion that courts should fashion injunctive relief that is no broader than absolutely necessary. (*Butt*, 4 Cal.4th at pp. 695-696 [“[a] court should always strive for the least disruptive remedy adequate to its legitimate task”].) Further, injunctive relief must be appropriately limited to those who in fact have been injured as a result of defendants’ actions. (See, e.g., *Intel v. Hamidi* (2003) 30 Cal.4th 1342, 1365 [injunction against mass e-mail communications was too broad given lack of evidence that all recipients

found e-mails unwelcome]; *Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 354.) Respondent acted in excess of its jurisdiction when it entered an injunction that will dramatically lower the graduation requirements of thousands of students who cannot even claim to have suffered a deprivation of their rights.

#### **D. Respondent's Order Violates the Rule Against Claim-Splitting.**

The specific remedy ordered by respondent fails as a matter of law for an independent reason that is unique to this case. Respondent recognized in its opinion that the resource problems about which it was concerned were the basis for a separate lawsuit, *Williams v. California*, that the State settled in August 2004. (Vol. XXXI, AA07630.) However, respondent found that inequalities persisted because that settlement is still being implemented. (*Id.*) Accordingly, what respondent did here was order a new remedy (excuse students from the CAHSEE graduation requirement) based on old claims previously litigated and settled in a different lawsuit.

Petitioners noted below that such a ruling would be barred by the single action rule (i.e., the rule against claim-splitting). (Vol. XXXI, AA07587-7588 [citing *Wulffen v. Dolton* (1944) 24 Cal.2d 891, 894].) Respondent disagreed, citing a Covenant Not to Sue entered by the *Williams* plaintiffs. (Vol. XXXI, AA07607, 07626.) A provision in the Covenant indeed exempts from its reach “an action contesting the denial of graduation from High School” based on the CAHSEE. (*Ibid.*) However, the Covenant Not to Sue, and its limitations, are irrelevant here. There is no indication in the *Williams* Agreement that, in agreeing to limitations on plaintiffs’ Covenant Not to Sue, defendants also agreed to waive any independent defenses they might have (arising under substantive law) were plaintiffs in fact to sue.

**E. Respondent's Order Cannot Be Justified as a Remedy for Alleged Unequal Allocation of Support Funds.**

Finally, respondent acted in excess of its jurisdiction when it premised injunction of the CAHSEE graduation requirement on purported equal protection violations attendant upon distribution of the \$20 million in supplemental remediation funds.

**1. The Legislature by Statute Defined the Manner in Which the Appropriated Funds Were to Be Distributed Based Upon Need.**

By statute, the funds were to be distributed to those school districts in which there were schools with the highest percentage of students who had not passed the CAHSEE:

b) The Superintendent shall rank schools on the basis of the percentage of eligible pupils. The Superintendent may give priority to schools with the highest percentage of eligible pupils who have failed both parts of the examination.

(c) From the funds appropriated for purposes of this section, the Superintendent shall apportion six hundred dollars (\$600) per eligible pupil to school districts on behalf of schools identified pursuant to subdivision (b) in the order determined by the Superintendent until the funds are exhausted . . . .

(Ed. Code, § 37254, subds. (b), (c).) As a result of this ranking, funds were provided to the school districts that had schools with 28 % or more eligible pupils. (Petition, ¶ 16.)

**2. Plaintiffs' Claims With Respect to the Funding Mechanism in Section 37254 Do Not Support Entry of a Statewide Injunction Against the CAHSEE Graduation Requirement.**

Respondent held that "most significant" to its decision to enjoin the CAHSEE was the funding mechanism created by section 37254.

(AA07630.) The court held that the funding mechanism was "arbitrary," and that defendants failed to identify any "compelling state interest that was

accomplished by assisting only some of those students, based solely on whether they lived in a district where more than 28% of seniors had not passed the test.” (Vol. XXXI, AA07631.) Respondent’s entry of a statewide injunction against CAHSEE graduation requirement on these grounds exceeded its jurisdiction for at least three reasons.

First, plaintiffs did not even state a claim that section 37254 is unconstitutional, let alone establish likelihood of success upon such a claim. Indeed they did not mention this statute anywhere in their Verified Petition and Complaint. Accordingly, there was no legal basis for the court to invalidate it on equal protection grounds, let alone use it to issue an injunction against an entirely separate statute (section 60851, subdivision (a)). While petitioners did not make this argument below, it is nonwaivable. (See *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 831, fn. 18; Code Civ. Proc., § 430.80, subdivision (a).)

Second, section 37254 is not unconstitutional in whole or in part. Even conceding for the sake of argument that strict scrutiny applies, any classification made by section 37254 is necessary to achieve a compelling state interest. Contrary to respondent’s assertion, section 37254 does *not* classify students based on whether or not they live in a district where more than 28% of students have not passed the CAHSEE. Instead, it classifies students on the basis of whether they live in a district that has the most number of schools with the highest number of students who have not passed the CAHSEE. Obviously, this classification is necessary to achieve a compelling interest: providing funds to school districts with the greatest need. There is nothing “arbitrary” about it.

Third, for the reasons demonstrated in Part II.A, the relief that respondent ordered would not be available as a matter of law, even were section 37254 somehow unconstitutional. If the statute is unconstitutional,

then the appropriate order is to direct the State to fix the funding mechanism over time (as the court did in *Serrano II*), not to lower a graduation requirement. Indeed, *Serrano II*, which similarly involved an equal protection challenge to a school funding system, is controlling and dispositive.

### III.

#### **RESPONDENT ABUSED ITS DISCRETION BY BALANCING THE HARDSHIPS AGAINST THE STATE.**

Finally, respondent also acted in excess of its jurisdiction when it held that the balance of harms favored plaintiffs rather than the State. (Vol. XXXI, AA07626-07627.) While the court committed numerous evidence-based errors, petitioners focus here solely on two legal issues that are dispositive on the “interim harm” question as a matter of law.

##### **A. State Societal Interests and State Educational Policy Are Irreparably Injured by a Judicial Determination That High School Students Must Be Permitted to Graduate Prematurely, Before They Can Demonstrate Sufficient Academic Competency to Do So.**

Respondent was wrong as a matter of law in holding that there was “no credible evidence” that harm would result were the injunction to issue. (Vol. XXXI, AA07627.) Far from being nonexistent, one of the many harms identified by the State below is *conclusive* on the issue of balancing of the harms. That is, the injunction alters and lowers the State standards for graduation for the Class of 2006 by allowing thousands of students who do not possess minimum skills in English and math to receive an otherwise standards-based diploma, contrary to the policy established by the Legislature. A judicial lowering of academic standards, and the consequent reversal of legislative policy, is a substantial harm in and of itself. Indeed,

given the fundamental importance of education in this state, as recognized by this Court's decisions in *Serrano* and *Butt*, respondent should have held that such a lowering of standards was dispositive on the balancing issue as a matter of law. In its decision, however, respondent did not even mention this concern.

**B. Respondent Erroneously Concluded That Students Would Suffer Irreparable Harm if They Are Not Permitted to Graduate With their Class.**

Also wrong as a matter of law was respondent court's characterization of the harm that would flow were the injunction denied. In its written decision, respondent expressed concern regarding the economic and social consequences of not having a diploma. (Vol. XXXI, AA07626-07627.)<sup>8/</sup> However, had the court denied plaintiffs' motion, it would not have followed that plaintiffs would forever be denied a diploma. Rather, students in the Class of 2006 who have not yet passed both parts of the CAHSEE have many options, including programs that permit them to continue studying and taking the CAHSEE so that they can obtain a diploma from their school; enrolling in a community college that is authorized to issue high school diplomas; obtaining a diploma equivalent, such as the GED; and enrolling in a community college and then transferring directly to a four-year college when they have completed sufficient credits. (Petition, ¶ 19.)

The actual harm at issue, therefore, was far more limited than respondent's opinion (or plaintiffs' arguments) suggested. That harm was the ability of students who had not passed the CAHSEE to graduate on time with their class, the Class of 2006. And that harm is insufficient, as a matter

---

8. Named plaintiffs, too, devoted extensive argument in their moving papers to this issue. (Vol. III, AA00747-748.)

of law, to justify an injunction as balanced against the State's compelling interest in raising academic standards.

### CONCLUSION

This petition raises an urgent and compelling question of law that is appropriate for resolution by this Court in the first instance: whether this Court's decisions in *Butt* and *Serrano* authorize a trial court to enter a statewide injunction against a state-mandated graduation requirement, absent any claim or finding that the graduation requirement itself is unconstitutional, but instead based solely the on allegation that some students (but not the named plaintiffs) were denied equal educational opportunities.

The Court should issue an immediate stay; grant this petition; hold that respondent acted in excess of its jurisdiction; and issue an alternative writ directing respondent superior court to set aside and vacate its order of May 12, 2006, granting plaintiffs' motion for preliminary injunction, or to show cause why it should not be ordered to do so, and upon return of the alternative writ issue a peremptory writ of mandate and/or prohibition or such other extraordinary relief as is warranted, directing respondent to set aside and vacate its order of order of May 12, 2006, granting plaintiffs' motion for preliminary injunction, and to enter a new and different order denying the motion.

Dated: May 19, 2006

Respectfully submitted,

BILL LOCKYER  
Attorney General of the State of California

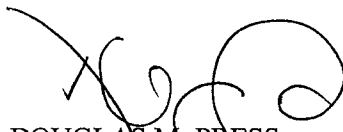
JAMES M. HUMES  
Chief Assistant Attorney General

MANUEL M. MEDEIROS  
Solicitor General


THOMAS R. YANGER  
Senior Assistant Attorney General

KARA READ-SPANGLER  
Deputy Attorney General

HADARA R. STANTON  
Deputy Attorney General



DOUGLAS M. PRESS  
Supervising Deputy Attorney General

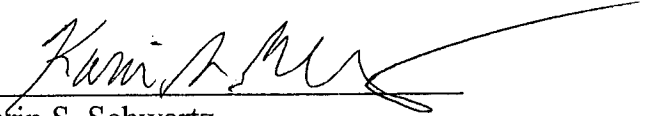


KARIN S. SCHWARTZ  
Deputy Attorney General

Attorneys for Petitioners

## **CERTIFICATE OF WORD COUNT**

This petition and the accompanying points and authorities consists of 9708 words as counted by Corel Word Perfect version 8 word-processing program used to generate these papers. The typeface is 13 point Times New Roman.

  
Karin S. Schwartz

SF2006200085

40092768.wpd